IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 20, 2008

STATE OF TENNESSEE v. TONYA MICHELLE TROUTT

Direct Appeal from the Criminal Court for Sumner County
No. CR693-2006 Dee David Gay, Judge

No. M2007-01354-CCA-R3-CD - Filed July 7, 2008

The appellant, Tonya Michelle Troutt, pled guilty in the Sumner County Criminal Court to theft of property in an amount over $1000 and theft of property in an amount more than $500. She received a total effective sentence of six years. On appeal, the appellant challenges the trial court's denial of alternative sentencing. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., and DAVID G. HAYES, Sr. J., joined.

Thomas J. Martin, Jr., Gallatin, Tennessee, and Paul J. Walwyn, Madison, Tennessee (at trial); and James O. Martin, III, Nashville, Tennessee (at trial and on appeal), for the appellant, Tonya Michelle Troutt.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; Charles Ronald Blanton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In August 2006, the Sumner County Grand Jury returned a multi-count indictment against the appellant. In counts one and three, the appellant was charged with theft of property in an amount greater than $1000, and in count two, she was charged with criminal trespass. On February 16, 2007, the appellant pled guilty to theft of property in an amount greater than $1000, a Class D felony, and to theft of property in an amount greater than $500, a Class E felony. Count two was retired.

Pursuant to the plea agreement, the appellant was sentenced as a standard Range I offender to four years for count one, the Class D felony, and two years for count three, the Class E felony. The plea agreement provided that the sentence for count three was to be served consecutively to the sentence for count one for a total effective sentence of six years. The agreement further provided that the trial court was to determine the manner of service of the sentences. At the plea hearing, the State informed the court that at trial the proof would have shown that on June 20, 2006, and June 29, 2006, the appellant went into the Hendersonville Wal-Mart store and "removed computer equipment."

At the sentencing hearing, the thirty-five-year-old appellant testified that in June 2003, she was convicted of child abuse and neglect because she left her daughter at home while she went to the store. The appellant said that she had thought her roommate was home at the time. She received probation for that offense. While she was on probation, she was convicted of driving while under the influence of an intoxicant and she used cocaine. These violations of probation resulted in her probation being revoked and then extended.

The appellant stated that in 2004, she was with Marletta Shrum when Shrum took items from a Wal-Mart store in Gallatin. Thereafter, the appellant and Shrum were both convicted of shoplifting. The appellant acknowledged that she received probation for that offense. While on probation, the appellant was charged with possession of drug paraphernalia.

The appellant acknowledged that in June 2005, she was charged with shoplifting from a Sears store. The appellant stated that she switched the tags of items so she would be charged a lesser price. However, the charge was eventually dismissed.

The appellant said that she left school in the ninth grade after being out for knee surgery. She said that she had problems reading and had difficulty helping her children with their homework.

In 2004, the appellant went to Buffalo Valley for a twenty-eight-day program to treat her drug addiction. While in the Buffalo Valley program, she began taking GED classes. She did not obtain her GED. After completing twenty-one days in the program, she left because of medical problems.

The appellant related that in 2000, she committed herself to a mental health hospital for treatment for depression. She stayed at the hospital for two weeks. In 2005, the appellant visited Cumberland Mental Health once a month for a few months. She stopped the visits because she thought she no longer needed them. She stated that she had back trouble, high blood pressure, high cholesterol, and "nerve problems." She had also had surgery on both knees. The appellant said that she was not taking any drugs except Xanax, Lortab, and Soma which were prescribed by a doctor. The appellant acknowledged that shortly after she received her prescriptions, the doctor's medical license was revoked for overprescribing medicine to his patients.

The appellant said that she and her husband were experiencing some financial difficulty at the time she committed the instant offenses. She said that on June 20, 2006, she went into the

Hendersonville Wal-Mart and switched the bar code on a $400 computer for a bar code which indicated the price of the item was $15 or $16. The appellant paid the altered price for the computer and left the store. Afterward, she sold the computer to "Tim" for $150. On June 29, 2006, she returned to the store and again switched the bar code on a computer. She was stopped by security and questioned about the June 20 event. The appellant told security that she had not committed the June 20 offense, claiming that her twin sister, who did not exist, had committed the offense. However, security recognized the appellant by a tattoo on her right shoulder, and she was apprehended for both offenses.

The appellant said that she now realized she could have asked her father or her three younger sisters for financial help instead of resorting to stealing. The appellant stated that she wanted to turn her life around and obtain a GED. She maintained that she was working for an elderly gentleman with Alzheimer's, cleaning and caring for him. The appellant conceded that on three occasions she had chosen to steal instead of asking for help. However, the appellant said that she had learned her lesson and apologized to the court.

The appellant's father and two of her sisters testified that they would be willing to help the appellant if she experienced financial difficulties. They asserted that the appellant had changed in the past year or so, becoming more responsible and a better mother to her children.

At the conclusion of the sentencing hearing, the trial court noted that the appellant had a supportive family, but she continued to engage in theft. The court stated that it did not believe that the appellant felt any accountability for her actions or knew the difference between right and wrong. The court opined that the appellant stole without conscience. The court was also concerned that the appellant had continued to reoffend after she had been granted probation. The court believed that such behavior indicated that the appellant's potential for rehabilitation was "nil." Therefore, the court sentenced the appellant to serve all of her four-year sentence on count one in the Tennessee Department of Correction, followed by intensive probation for the remaining two-year sentence. On appeal, the appellant challenges the trial court's denial of probation on count one.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2006). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in her own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of her sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will

accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

Generally, an appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006). The appellant's sentences meet this criteria. Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered a favorable candidate for alternative sentencing absent evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6) (2006). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. See Tenn. Code Ann. § 40-35-103(5).

In the instant case, the appellant is a standard Range I offender convicted of a Class E and a Class D felony; therefore, she is considered to be a favorable candidate for alternative sentencing. However, the court noted that the appellant's criminal history indicated that she had previously been charged with and convicted of similar offenses. Moreover, the court noted that the appellant had twice been granted probation, and both times she violated the conditions of probation.

The appellant argues that the trial court disregarded the positive changes that the appellant had made in her life. However, evidence of these changes was before the court and the court nevertheless determined that the appellant's potential for rehabilitation was poor. Based upon the appellant's admitted history of repeatedly violating probation, we conclude that the evidence does not preponderate against the trial court's ruling.

III. Conclusion

Finding no error, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE